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IN THE

Supreme Court of the United States

October Term, 1968

No. 1174

UNITED STEELWORKERS OF AMERICA, AFL-CIO, *Petitioner*,

v.

HAMILTON STEEL PRODUCTS, INC., NATHAN YORKE, and THE UNION CENTRAL LIFE INSURANCE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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I

The Insurance Company contends that our petition is both too late (Brief in Op., p. 4) and too early (Brief in Op., p. 5). This paradoxical contention, which we demonstrate in Part II is unsound, is available only because of the unsettled state of the law governing this action, and reinforces the importance of prompt resolution of that law.

From the Insurance Company's standpoint, this is a traditional state-law insurance controversy; the interpleader action is the beginning and the end of the litigation which should resolve that controversy; and we either should have petitioned for certiorari from the denial of intervention in the interpleader action, or the union representatives who are parties to that action should appeal from the final decision therein. To the Insurance Company, our 301 action is an elephant trampling upon the verdant pasture of state insurance law, which should not divert the attention of this or any other court.

From our standpoint, on the other hand, Section 301 is what this litigation is all about. We tried to intervene in the interpleader action to advance our 301 claims, but we were denied admission. So we took the only other course available to us—one suggested in the Court of Appeals' decision denying intervention—and instituted our own Section 301 action.

To be sure, the result is a crazy quilt of parallel lawsuits actively competing with each other as to what law governs the resolution of this dispute. But that procedural incongruity is not a reason for denying certiorari. On the contrary, it is a reason for *granting* certiorari. Until this Court determines the governing substantive rules, it is inevitable that controversies of this type are going to get entangled in procedural quagmires, for in this area the procedural steps all are dictated by the party's view of the applicable law.

One additional example will illustrate the kinds of procedural problems which stem from confusion over the governing substantive rules. In the interpleader action, the district court (treating it as a state law action) has insisted that the employees must appear by private attorney if they wish to secure any portion of the fund, and that the union representatives may not advance the employees' claims. (Vol. I, pp. 58-60, 81, 87-95, 110). In the 301 action, however, the Union, as exclusive bargaining representative of the employees, is entitled to appear as the representative of employees' interests, indeed as the *sole* representative of those interests. *Acuff* v. *United Papermakers and Paperworkers,* 404 F.2d 169 (5th Cir., 1968); *Vaca* v. *Sipes,* 386 U.S. 171 (1967); *Humphrey* v. *Moore,* 375 U.S. 335 (1964). Two consequences turn on that distinction

1. If this controversy is governed by Section 301, employees' rights will be enforced without their having to pay any attorneys' fees or court costs. (These are benefits which the Union provides, as a matter of course, whenever it sues to enforce 301 rights. Its members have paid dues to ob-

tain the Union's representation; they are not asked to pay any more when the Union exercises those representational responsibilities). On the other hand, if this is a state-law dispute, in which the Union may not assert its exclusive authority, the result is likely to be imposition of attorneys' fees upon the individual employees. Indeed, that result has already been compelled in the interpleader action: the district court entered a "first partial interlocutory decree" providing certain employees who had procured the services of an attorney with benefits which were not disputed (Vol. I, pp. 48-52), despite a representation by the attorney that he would receive 10 per cent of the award (*Id.*, p. 44). The union representatives moved to vacate that decree on the ground, *inter alia*, that no attorney should receive a fee from the award for securing collectively bargained benefits (*Id.*, p. 58), and in the alternative they moved that the decree be amended to include other employees, similarly situated except that they had not retained an attorney (*Id.*, pp. 59-60). The Insurance Company and the above-mentioned attorney both opposed this motion, and urged that no other employees be awarded benefits until they too had secured a private attorney (*Id.*, pp. 81, 87-95). The court denied the union representatives' motion (*Id.*, p. 110), thus conditioning the right of other employees to secure their benefits upon their hiring an attorney to prosecute their claims.

2. It is quite likely that, at some point, a dispute is going to arise as to the proper allocation of the pension fund among the employees.[1] If this is a 301 action, the Union is entitled to advance, exclusively, its view of the proper allocation of the fund as between employees, taking into account its determination of the best interests of the group as a whole. *Acuff* v. *United Papermakers and Paperwork-*

[1] This will be particularly true if it is determined that the employer may not recapture any of the fund, and that this disputed portion must be distributed to the employees.

ers, 404 F.2d 169 (5th Cir., 1968); *Humphrey* v. *Moore*, 375 U.S. 335 (1964); *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953). If, however, this is a state-law action, the individual employees will be entitled to participate directly and engage in cut-throat competition, each to secure for himself the greatest share of the pie. The labor movement was born out of a desire to eliminate such competition among workingmen, and the National Labor Relations Act was enacted with that same objective. *J. I. Case Co.* v. *NLRB*, 321 U.S. 332 (1944); *Acuff, supra; Humphrey, supra.*

II

We turn now to the specifics of the Insurance Company's claim that we are both too late and too early.

We are too late, the Insurance Company says, because we should have petitioned for certiorari from the Seventh Circuit's earlier decision denying the Union's motion to intervene in the interpleader action. We did not seek review of that decision for two reasons:

(a) The decision turned on the Seventh Circuit's notion that Section 301 does not give unions rights to intervene in lawsuits between other parties (374 F.2d at 822-23). Thus, the only issue upon which review could have been sought was the technical question of right to intervention. While we believed the Seventh Circuit's decision denying intervention was incorrect, we were not interested in seeking certiorari to review the law relating to intervention. Rather than delaying employees' receipt of pension benefits while the parties battled over the law of intervention, it seemed more expeditious, and more sensible, to initiate a separate 301 action.

(b) Our decision to go the latter route was strongly reinforced by the Seventh Circuit's comment: "In contrast, if this were a suit by the Union to enforce

> group rights created by a collective bargaining contract, the requirements of Section 301(a) would be met" (374 F.2d at 823). It seemed to us that the Seventh Circuit was telling us we had chosen the wrong course; i.e., that in its view Section 301 does not authorize intervention, but it does authorize a separate lawsuit. Indeed, we feared that if we petitioned for certiorari from the intervention decision the Insurance Company would argue that we had not pursued the alternative course which the Seventh Circuit had charted for us. Apparently, we were damned if we did, and damned if we didn't.

The earlier decision did not hold that the Union is without right to participate in *any* litigation over the distribution of the funds, and it did not hold that Section 301 and the pension agreement are irrelevant to that determination. Since these are precisely the issues we wish reviewed, and only the second decision decided them, this is obviously the proper time to petition for certiorari.

We are too early, the Insurance Company says, because "the judgment below does not bar the Union from asserting any argument on the merits it wants to assert in the District Court, through its representatives who are defendants in the pending declaratory judgment and interpleader suit (and who are represented by the Union's same attorneys)". (Brief in Op., p. 5). This contention is disingenuous.

The Insurance Company took the following position in the interpleader action:

> "It is submitted further that the mere appearance of certain representatives and agents of the union, in their representative capacities, does not give the union, or such representatives, a vicarious right derivative or otherwise, to represent persons who were formerly, or may be now, members of the union, and who have

vested property rights under the policy." (Vol. I, p. 81).

That position was accepted by the district court, which granted the Insurance Company's motion to strike the union representatives' motion to vacate or amend the "first partial interlocutory decree". In light of this success, surely it is disingenuous for the Insurance Company to tell *this* Court that the presence of the union representatives in the interpleader action adequately protects the interests which the Union seeks to advance by this 301 action.

> "A plaintiff who has obtained relief from an adversary by asserting and offering proof to support one position may not be heard later in the same court to contradict himself in an effort to establish against the same adversary a second claim inconsistent with his earlier contention. Such use of inconsistent positions would most flagrantly exemplify that playing 'fast and loose with the courts' which has been emphasized as an evil the courts should not tolerate . . . And this is more than an affront to judicial dignity. For intentional self-contradiction is being used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice." *Scarano* v. *Central R. Co. of New Jersey,* 203 F.2d 510, 513 (3rd Cir., 1953).

In the interpleader action, the union representatives cannot speak even for those employees who want them to, let alone assert the Union's right to be *exclusive* representative of the employees in procuring the proper distribution of the fund. Nor is this likely to be the end of the union representatives' travail. The attorney for the individual employees has served notice that he will proceed against them, and their attorneys, for unauthorized practice of law if they attempt further to advance the interests of the employees in the interpleader action (Vol. I, pp. 92-93).

Moreover, wholly apart from these inhibitions on the

functioning of the union representatives, it is clear that they can play no meaningful role in the interpleader action in light of the decision below. The decision below rejects each of the substantive claims which the Union would wish to have advanced, and it is self-evident that that decision will be adopted and followed by the lower courts in the interpleader action. Thus, if this Court were to deny certiorari now, the question would return to this Court several years later, and if the Union's position is then upheld by this Court the parties would have to go back and start all over in the district court. The employees awaiting receipt of their pension benefits can ill afford the several years' delay which would result from that course.

III

The Insurance Company seeks to distinguish the decisions in *Connecticut General Life Insurance Co.* v. *Craton,* 405 F.2d 41 (5th Cir., 1968) and *International Union* v. *Textron, Inc.,* 312 F.2d 688 (6th Cir., 1963) and 359 F.2d 966 (6th Cir., 1966), on the ground that neither of those decisions ordered arbitration of the meaning of an insurance contract. (Brief in Op., pp 5-6). But *we* do not seek that relief either. We are seeking arbitration of the meaning of the *pension* agreement (the propriety of which is unquestionable), and a determination that Section 301 requires a *court* to construe the insurance contract *in pari materia* with the pension agreement.[2] It is the *latter* proposition which we contend was sustained in the cited cases.[3]

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[2] We noted in our petition that this doctrine would be applicable only where the insurance contract was drawn with an intention that its coverage be coterminous with the coverage of the pension agreement. The Insurance Company does not dispute our contention that this is such a case.

[3] The Insurance Company's contention that *Textron* did not decide this issue (Brief in Op., p. 6) is incorrect. In *Textron,* the court interpreted the pension agreement, and then directed that the fund held by the Insurance Company pursuant to the insurance contract be disbursed in accordance with that interpretation.

To be sure, if Section 301 means what we contend it means, the Insurance Company has an interest in the arbitration, for the arbitrator's determination of the meaning of the pension agreement would then be attributed to the insurance contract. Perhaps that interest would entitle the Insurance Company to participate in the arbitration, cf. *Transportation-Communication Employees Union* v. *Union Pacific Railroad Co.*, 385 U.S. 157 (1966); *Columbia Broadcasting System, Inc.* v. *American Recording and Broadcasting Association*, ——F. Supp.——, 69 LRRM 2914 (S.D.N.Y. Dec. 3, 1968), a participation which we would not oppose.

IV

The Insurance Company notes that in the opinion in the interpleader action the court below stated that the Union "by its attempt to intervene and participate before the District Court and by participating in Hamilton's bankruptcy proceedings . . . waived any contractual right to arbitration". 374 F.2d at 824. The court below relied on no such theory in its decision in the *instant* case. If it had, this would have been an additional "question presented" warranting certiorari. The Union's efforts to participate in the interpleader and bankruptcy actions are in no way inconsistent with its desire to arbitrate the meaning of the pension agreement. On the contrary, one of its principal purposes in seeking such participation has been to advance its claim for arbitration. The doctrine of waiver so casually announced is flatly inconsistent with the national labor policy favoring arbitration. Section 203(d) of the Labor Management Relations Act, 1947, 61 Stat. 154, 29 U.S.C. § 173(d); *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960).

The Insurance Company also advances a waiver theory of its own (Brief in Op., p. 4): that the union representa-